

Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, AFL-CIO¹ and Sound Distributing Corp. Case 2-CB-12968

July 13, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On January 27, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Soft Drink Workers Union Local 812, International Brotherhood of Teamsters,

¹ The name of the Respondent has been changed to reflect the new official name of the International Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the complaint was amended at the hearing to allege that the Employer is engaged in the nonretail distribution of beer and alcoholic beverages, not soft drinks. The Employer admitted the amended allegation.

We reject the Respondent's contention that there is no evidence that the Union or any of its members placed the "tire jacks" in the road. (Tire jacks are two nails welded together to form spikes, similar to caltrops.) Rather, we find that as in *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111 fn. 1 (1991), which involved similar conduct by the same Local Union during the same period of time, the judge reasonably inferred from the strong circumstantial evidence that picketing union members placed the tire jacks on Electra Lane. In finding that the Respondent was responsible for the tire jacks, we also rely on the judge's findings regarding the October 17, 1989 incident during which, in the presence of union agents, pickets Lugo and Coste threatened and assaulted driver Davis as he was leaving the Employer's facility. In particular, the judge found that as Davis attempted to remove tire jacks from the road, Lugo said, "I'll kill you, give me them tire jacks, you took my job."

In view of the evidence that union agents were present on the picket line when the acts of misconduct occurred, Chairman Stephens and Member Devaney find it unnecessary to pass on the judge's reliance on *Avis Rent-a-Car System*, 280 NLRB 580 fn. 3 (1986). See Member Devaney's concurring and dissenting opinion in *Pepsi-Cola Newburgh*, above.

We note that no exceptions were filed to the other findings and dismissals by the judge.

AFL-CIO, Scarsdale, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

Randy Girer, Esq., for the General Counsel.

Sidney Fox, Esq. (Shapiro, Shiff, Beilly, Rosenberg & Fox), for the Union.

Joseph Baumgarten, Esq. (Proskauer Rose Goetz & Mendelsohn), for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on various dates in 1991. The charge and amended charge in Case 2-CB-12968 were filed on September 22 and November 2, 1989. Thereafter a consolidated complaint and notice of hearing was issued on January 31, 1991.¹ In substance the complaint made the following allegations:

1. Commencing on August 11, 1989, the Union picketed the employer.

2. On or about August 11, 1989, union pickets drove a car in front of two company trucks in a reckless and dangerous manner.

3. On or about August 11, 1989, the Union (by a striking employee) threatened nonstrikers with unspecified reprisals in New Rochelle.

4. On or about August 11, 1989, the Union, by strikers Jose Coste and Ralph Cotto, blocked egress of a truck from the Employer's plant; banged on the door; removed beer barrels from the truck and threatened the truck's occupants with physical violence.

5. In or about early August 1989, date unknown, the Union, by unidentified agents, blocked ingress and egress to the Employer's plant thereby slowing down progress of company vehicles.

6. In or about early August 1989, date unknown, the Union, by unidentified agents, placed metal spikes on Electra Lane which is the road leading to the Employer's facility.

7. On or about August 25, 1989, the Union, by unidentified agents, shot unidentified missiles through a truck window.

8. On or about September 22, 1989, near 241st Street, the Union by strikers Wilfredo Lugo, Larry Williams, and other agents, kicked and slapped a nonstriking employee and challenged him to a fight.

9. On or about September 22, 1989, near 241st Street, the Union by Wilfredo Lugo, Larry Williams, and other agents, slashed tires on a vehicle owned by a nonstriker and brandished a knife at a nonstriker.

10. On or about September 22, 1989, the Union, by unidentified agents, threw rolled up newspapers at a car window.

11. On or about September 22, 1989, the Union, by unidentified agents, brandished bats and sticks and ran in menacing manner toward nonstrikers.

¹ Allegations against the Employer in Case 2-CA-23864 were settled at the outset of the hearing. As a result, that case was severed from the present case.

12. In September 1989, the Union, by unidentified agents, threw rocks at a truck.

13. On or about September 22, 1989, the Union, by Nick Pretino and other agents, brandished metal pipes and challenged nonstrikers to a fight.

14. On or about October 6, 1989, the Union, by unidentified agents, threw rocks at nonstrikers and threatened them with unspecified reprisals.

15. On or about October 17, 1989, the Union, by unidentified agents, threatened to kill a nonstriker.

16. On or about October 17, 1989, the Union, by Wilfredo Lugo and Jose Costa, assaulted a nonstriker on a truck, challenged him to fight, and threatened to kill him.

17. On or about October 18, 1989, the Union, by Jose Costa, at Manhattan College, drove his car toward a nonstriker so as to hit him with his side view mirror.

18. On or about October 18, 1989, the Union, by Nick Pretino and others, threatened nonstrikers with unspecified reprisals at various locations.

19. On or about October 18, 1989, the Union, by Nick Pretino and others, pushed nonstrikers out of the way and stepped in front of them while they attempted to talk with the Company's customers.

20. On or about October 18, 1989, the Union, by Nick Pretino and others, at a Waldbaums, threatened to kill a security guard of the Company. (In her brief, the General Counsel withdrew this allegation as no evidence was produced to support it.)

21. On or about October 19, 1989, the Union, by Nick Pretino and others, at 241st Street, brandished bats, slammed a door on nonstrikers who drove a truck, and hit a truck windshield with a bat.

22. On or about October 19, 1989, the Union, by unidentified agents, threw objects at the Company's trucks.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits, and I find, that Sound Distributing Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union also concedes that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The employer (Sound) is engaged in the wholesale distribution of beer and soft drinks. It operates three warehouses and employs people to deliver these products to various retail establishments mainly in the Bronx and Westchester. One of the three warehouses is located at Electra Lane in Yonkers, New York, and all the alleged misconduct occurred in relation to employees located at or working out of that location.

The Respondent and Sound have had a collective-bargaining relationship since the 1950s wherein the truckdrivers and warehousemen have been represented by the Union. There are about 45 to 50 employees in the bargaining unit. The last contract expired on July 31, 1989, and after negotia-

tions failed to result in an agreement, the Union commenced a strike on August 10, 1989. The strike was still in progress at the time of the hearing in this matter as no new contract had yet been reached.

In relation to the picketing, the Union's shop steward, Robert Delmonico, was designated as the strike coordinator and he in turn named three picket captains; Corado Petrilla, Cornell Yarborough, and Ralph Cotto, all of whom are striking employees. From time to time, union delegates Tommy Rosano and Ted Hutchinson also were present at the picket line. (Hutchinson retired in January 1990.) Picketing was carried out 7 days per week and on a 24-hour basis except for Saturday night. In addition to placing a picket line at the employer's facility at Electra Lane, the evidence shows that the Union engaged in handbilling of Sound's customers. This activity involved, at least on some occasions, pickets being dispatched in cars to follow Sound's trucks and distributing handbills urging its customers not to buy from Sound.

All strikers who engaged in picket line duty received \$55 per week from the International Union. No one had their strike benefits cut off or reduced on account of any alleged misconduct attributed to them. Also the evidence shows that no person was disciplined by the Union because of alleged strike misconduct. On the contrary, the Union vigorously and successfully defended all strikers who were charged with criminal misconduct.² There was, however, some evidence to suggest that one person who engaged in picketing and who was not a Sound employee was sent away from the picket line after he was involved in an alleged incident.

At the outset of the picketing the Union gave instructions to the strikers which emphasized that the picketing should be carried out in a peaceful manner.

The Employers for its part, immediately hired strike replacements. It also hired a security guard service to protect its facilities and to protect the replacements as they made deliveries to the Company's customers. As part of its defensive actions, the Employer, through the security firm, placed a video camera which was used to surveil Electra Lane at all times relevant to this case. According to one of the security employees (Rosando Perez), the video camera was manned 24 hours per day, was capable of recording by the light from the street lamps, and was turned on whenever a person or vehicle entered or left Electra Lane. Despite several allegations of misconduct taking place at Electra Lane, video taped pictures were offered only as to an incident that took place on October 17, 1989.

Also by way of background, it is noted that this same Union at an unrelated company was found to have violated Section 8(b)(1)(A) in the summer of 1989, by engaging in conduct which was contemporaneous with and in certain instances very similar to that alleged in the present case. Thus in *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111 (1991), Administrative Law Judge Barry Morris held that the Union, at the picket line, was responsible for unidentified persons who placed nails (which were identical to the type involved in the present case) in the road leading to the plant and thereby caused flat tires. He also found that the

²Frankly, I see nothing wrong with a union affording legal defense to employees who are charged with crimes in connection with picketing, particularly where the alleged acts are denied by the respective defendants.

Union, after assigning strikers to follow trucks, was liable for the acts of a striker who drove his car in such a way as to impede a truck's progress and to create a driving hazard. (The driver placed his car in front of the truck and constantly braked his vehicle.)

B. *The Alleged Misconduct*

There were several incidents alleged in the complaint which were based on the evidence given by a strike replacement, Steven Costanza. The General Counsel contends that on or about August 12, 1991, strikers threw rocks and debris at Costanza as he walked to work. The second allegedly took place on October 18, 1991, on Broadway in the Bronx where striker Jose Coste allegedly ran into him with his car. The third involved a situation during the same day when strikers, in their effort to hand leaflets out, allegedly pushed Costanza aside as he was making a delivery to a customer. The fourth involves an alleged attack by certain strikers with baseball bats on a company truck in which Costanza was a passenger. I shall recommend that all these allegations be dismissed for the following reasons.

Costanza did not testify in this hearing despite the efforts of the General Counsel to enforce a subpoena that probably was served on him. (On March 26, 1991, the United States District Court issued an order requiring Costanza to testify in this case.) As it appeared that Costanza was not available within the meaning of Section 804 of the Federal Rules of Evidence, I admitted into evidence, pursuant to Rule 804(b)(2), certain prior testimony that he had given in a state court proceeding involving the same parties and an affidavit that he had give to a Board agent during the investigation of the case.³

Notwithstanding the fact that I accepted into evidence Costanza's prior testimony and a prior affidavit, the incidents he described all took place when other *nonstrikers* were present. Therefore, there were other corroborative witnesses who were available but who were not called by either the General Counsel or the Charging Party. This is contrasted to the live witnesses who were called by the Respondent, were

subjected to cross-examination, and who effectively denied Costanza's allegations. Moreover, the Respondent introduced into evidence another affidavit that Costanza had given to the Union wherein he retracted a significant portion of his assertions against employee Jose Coste.

John Kuehn, a sales supervisor, testified that on August 11 at 7:30 a.m. he went on delivery truck with employee Fabio Fernandez and a guard when Tim Mahon and Jose Coste, two of the strikers, blocked the road leading from the warehouse on Electra Lane with their vehicles. Kuehn testified that when the truck stopped Coste banged on the window, tried to open the door, and said that he was going to get them and kill them. According to Kuehn, Ralph Cotto (a picket captain) jumped onto the running board on the passenger side and knocked three beer barrels off the truck.

Despite the video surveillance, no pictures were offered into evidence by the General Counsel or the Charging Party. Kuehn states that this incident happened where Electra Lane turns into McQueston Parkway and may therefore have been too far to take pictures. The other two people in the truck were not called as witnesses.

Jose Coste, a striker, testified that he was present at the picket line on August 11 and did not see any incident involving Cotto and beer barrels. Coste denied jumping on the truck's running board, banging on a window, or making any threats against the truck's occupants. The Respondent did not, however, call Cotto or Mahon to testify regarding these alleged incidents.

Kuehn also testified that on August 11, 1989, while on route with a driver and a guard, strikers Tim Mahon and David Robinson drove their vehicles in front of his truck and began to brake so as to impede the truck's progress. Kuehn states that the two strikers followed his truck into a parking lot on Central Avenue where he was going to make a delivery. He states that after driving around in the parking lot for a while, the security guard called a police car over, whereupon Robinson took off. Kuehn states that the police officer "asked Mahon what he was doing and told him to stop harassing us or risk arrest." Neither Mahon nor Robinson testified in this proceeding.

Edward Vogel, an independent truckdriver, also testified to similar types of braking conduct by striker's vehicles after they followed him from the plant. He testified that there were about five or six incidents of this nature in August 1989, usually occurring in Yonkers after he left Sound's warehouse at 11 a.m. He testified that on a couple of occasions the vehicles were driven by John and Cornell Yarborough. (Cornell Yarborough was a picket captain.) Neither of these individuals testified.

Howard Honigman, a sales manager, testified that on August 11, 1989, he accompanied driver Bill Czacka and a security guard in one of the Company's trucks. He states that while on Central Avenue he was passed by two cars which proceeded to make quick stops in front of the truck. According to Honigman, the people in the cars were striker Tim Mahon and someone named Skip who was never identified as a striker, union agent, or picket. According to Honigman, when the truck reached its destination, the two

³ I have no doubt that Costanza's prior court testimony should be admitted as an exception to the hearsay rule because that proceeding involved the same parties, had essentially the same issues, and the Respondent had the same opportunity and interest in cross-examining him. *Ohio v. Roberts*, 448 U.S. 56 (1980). On the other hand, I doubt very much whether the affidavit that Costanza gave to the Board agent during the investigation should have been received, or if received, given any weight. Although I have absolutely no doubt as to the reliability of the Board agent (who has no interest in the outcome of the case), it is the declarant's and not her reliability that is at issue. In the absence of any opportunity by the Respondent to cross-examine the witness, and absent a showing that he is deceased (see for example *Fenetrol Inc.*, 256 NLRB 796, 804 (1982)), I do not think that Costanza's unavailability for unknown reasons, sufficiently outweighs the hearsay objection to his affidavit, in so far as that affidavit is offered affirmatively to prove the truth of the assertions and allegations made against the Respondent.

For other cases dealing with Rule 804 see *Doral Building Services*, 266 NLRB 1215 (1983) (affidavits received in a representation case); *Host Services*, 263 NLRB 672 (1982) (respondent's offer of unemployment hearing testimony rejected because no showing that witness unavailable); *K & K Transportation Corp.*, 254 NLRB 722, 733 (1981) (affidavit rejected where General Counsel failed to prove unavailability).

men following them handed out leaflets to the customer.⁴ Neither Mahon nor "Skip" testified in this proceeding.

Rosando Perez, a security guard, testified that on August 11, 1989, he was on delivery truck with two company employees, Mike McCabe and Frank Falzone. He states that when they arrived at a customer at about 10 a.m. Peter Mahon, with two other unidentified strikers, said that whether it takes a day, a year, or a month, Mahon was going to get those guys. Perez also states that Mahon said that he was going to be around when they went home at night. (Peter Mahon did not testify.)

Edward Vogel testified that some time in August 1989 (date unknown) as he drove his rig into Electra Lane at 3 a.m., his front window was hit with a bb shot which caused the window to break when his rig hit the next bump in the road. Vogel did not see who did this and states that the police officers who were at scene neither apprehended anyone nor found any gun. He states that although he doesn't know the names of two of the three pickets present, one was a man named Mikey whom Vogel believes was a striker but not a union official.

George Muniz testified that on September 22, 1989, at about 9 a.m., he drove with Jose and Carlos Rodriguez (all nonstrikers) to 241st and White Plains Road where they stopped to get some food at a delicatessen. He states that one of the strikers (a man he can't identify) came up to Jose and said: "Do you have a problem with me," which elicited Jose's response: "No, do you have a problem with me?" At that point according to Muniz, the unidentified man slapped Jose in the face and two other strikers, Wilfredo Lugo and Larry Williams, arrived on the scene. According to Muniz, Lugo and Larry Williams took out knives, whereupon Carlos went back to the car and got out a tire iron. Muniz testified that there was a face off but that Lugo slashed one of Jose's tires and that the unidentified striker kicked Jose twice before they returned to the plant. He states that they drove fast and went through a puddle on Electra Lane, splashing the strikers. According to Muniz, when he, Carlos, and Jose reached the plant and got out of the car some of the strikers moved toward them, brandishing bats, sticks, and pipe whereupon Carlos got out of the car with a golf club in his hand. (The testimony of Muniz was not corroborated by either Jose or Carlos Rodriguez.)

In relation to the incident at the delicatessen on 241st Street, Muniz testified that the person who slapped him did not appear at the picket line for several months after September 22, thereby leaving the implication that the Union had him removed from the picket line activity. Also, Muniz' affidavit is somewhat different from his testimony on direct, particularly insofar as whether Lugo first pulled out a knife or Carlos first pulled out a tire iron. In an affidavit Muniz gave on October 5, he stated:

When we got out of the car to go into the grocery the striker we had previously seen came up to Jose and said in Spanish "do you have a problem with me." Jose responded, no do you have a problem with me. The striker then slapped Jose across the face. At that moment,

two other individuals, whose names I do not know, but I also recognized as striking employees of Sound Distributing came out of a nearby store and approached me. The two individuals challenged Carlos to move away from the car and fight. When Carlos took a tire jack out of the car, to defend himself, one of the strikers took out a knife. Carlos moved away from the car, at which point one of the two individuals slashed one of tires with his knife.

The Respondent called Wilfredo Lugo to testify as to the events at the delicatessen on September 22. He testified that he went with Tommy Rivera and Alex Rosario to a coffee-shop where they met strikers David Robinson and Ralph Cotto. (As noted above, Cotto was a picket captain.) Lugo testified that at one point after Alex Rosario left the coffee-shop, Lugo and the others walked outside and saw that Alex and replacement Jose Rodriguez were calling each other names and were facing off as if to fight. Lugo states that he ran over to grab Alex away and that Tommy ran between the two combatants. According to Lugo, replacement Carlos Rodriguez went over to Jose's car, pulled out a tire iron, and approached the combatants. Lugo states that the next thing he saw was Carlos Rodriguez and Muniz running around the block and Jose getting back in his car and driving off. Lugo denies that either he or anyone else had a knife.

Lugo did not testify regarding the alleged slaps to Jose by Alex as his testimony was that he was not present when the initial confrontation occurred. Also, none of the other participants or witnesses to this event other than Muniz and Lugo testified. In a criminal proceeding brought against Lugo in relation to the above, he was found to be not guilty.

Regarding the incident at Electra Lane on September 22, Robert Delmonico, the Union's shop steward, testified that he was at the picket line when a car drove quickly through the puddle and splashed all the pickets. He says that when the driver and passengers got out of the car they brandished a golf club and bats, whereupon everyone on picket line got mad and started to run at them while they ran into the building. Delmonico testified that there was a lot of yelling, and that the pickets ran part way to the building, stopped, and returned. He says that the event quickly quieted down and nothing else happened.

Muniz testified that there exists and he saw a video tape of the car going through the puddle on September 22. However, that video tape was not offered into evidence and this suggests that at least as to what took place at the picket line, the incident was relatively innocuous.

According to Muniz, he, Jose, and Carlos Rodriguez were at the Lunchbox on September 28, 1989, when a car pulled up with striker Nick Pretino and the person who previously had slapped Carlos Rodriguez. He states that this person challenged Carlos to fight but that nothing else happened because Muniz and his group returned to the plant. This incident was denied by Pretino. Neither Carlos Rodriguez, his brother Jose, nor the other person testified in this proceeding.

General Counsel's Exhibit 7 is an item consisting of two nails welded together to form triangle so that has one point always sticks up. The General Counsel described it as a "tire jack." From its design, it would seem to have no function other than to cause flat tires when placed in a street. The General Counsel produced four witnesses (Vogel, Davis,

⁴Honigman signed an affidavit dated August 19, 1989, which related a number of incidents. It did not, however, relate the incident on Central Avenue on August 11.

Honigman, and Perez) who testified not only to seeing these tire jacks in the road (usually in and around the puddle on Electra Lane), but also to extracting them from their tires. The Union's witnesses for their part denied ever seeing these items either in the road leading to the plant or anywhere else.

William Davis testified that on October 17, 1989, at about 7:45 a.m., he was leaving the facility in a truck with Patrick Roberts and a security guard. He states that because he saw spikes in the puddle he stopped the truck to pick them up. According to Davis, as he went back to cab, striker Lugo demanded the return of the tire jacks and when he refused Lugo said, "I'll kill you, give me them tire jacks, you took my job." According to Davis, Lugo tried to pull him from the cab of the truck whereupon striker Coste slammed the door on his foot. He states that as he did this, Coste said; "You motherfucker, we're going to get you." Davis testified that his foot was injured and had to be treated in a local hospital.

General Counsel's Exhibit 10 is a video tape which shows that the incident happened on Electra Lane, by the puddle, and lasted about 15 seconds. It shows a striker trying to pull a driver out of the cab and another striker slamming the door on his foot. Delmonico, the Union's shop steward, appears on the tape but was not directly involved in the incident.

Delmonico states that he was present at picket line on October 17 and did not see the incident until it was over. In Delmonico's affidavit, he stated that he saw Wilfredo Lugo and Jose Coste approach the truck but did not see or hear any violence against the driver.

According to Lugo, he stuck out his tongue and made a gesture at the truckdriver whereupon the driver got out of the truck, called him a motherfucker, spic, asshole, and pushed him so as to cause his coffee to spill. Lugo says that he pushed the driver back and that they grabbed each other. He states that a couple of strikers came over and Jose Coste went to the right side of the truck where there was a helper and guard. According to Lugo, when the driver went back to the truck, the driver kicked the door open so that it hit Lugo whereupon he got mad and tried to grab the driver by the leg.⁵ Unfortunately Lugo's version is not supported by the tape as there is nothing in the tape which shows the driver opening a door and using it to hit Lugo.

Jose Coste, although called as a witness by the Respondent, was not asked by the Respondent to testify as to the incident on October 17. On cross-examination, he was shown the video tape and recognized some of the people on the picket line that day as being himself, Cornell Yarborough, Joe Escabel, Torto, Scabelli, and Union Agent Terry Hutchinson.

Pretino testified about the October 17 incident after being shown the video tape. He states that he recognized himself in the tape and that he challenged the driver to come out. Contrary to Lugo's version as to how this incident began, Pretino testified that the driver brandished a bat at him Pretino and cursed at him. According to Pretino, this is what provoked him to say something like, "come on out, lets see how tough you are."

⁵ In his testimony in state court, Lugo said that he did not grab the driver's leg. He acknowledged here that that testimony was incorrect. It is noted that the criminal allegation against Lugo regarding this incident was dismissed.

In addition to the alleged incidents described above, the General Counsel's witnesses testified to a few other incidents which were more indeterminate in nature.

George Muniz testified that as he was driving through the picket line the strikers routinely called him names. After a leading question, Muniz also testified that on one unspecified occasion, the unidentified striker who slapped Jose Rodriguez said to Carlos Rodriguez, "Why don't you fight; I'll kick your ass."

William Davis testified that on unspecified occasions the pickets threw things or banged on his truck as he passed through Electra Lane. He could not, however, testify as to who or what was thrown. Davis testified that the pickets often called him and the other replacements names such as scab, etc. He states that the pickets said, "We'll get you, you took our jobs." Davis was not specific as to dates or times, although saying that this type of conduct took place in the early stages of the strike. (Presumably in August 1989.)

Vogel testified that on one unknown occasion he heard a beer bottle thrown at the side of his truck. He states that he surmised it was a beer bottle because he saw the broken glass on the ground. He did not see who threw the object and indicates that the incident took place sometime before October 1991. Vogel also testified that at various times (dates unknown) unidentified picketing employees said to him as he was driving through the line, "We're going to get you; when the dog bites, the dog bites hard." Finally, Vogel testified that on several occasions, pickets walked in front of his truck to try to slow him down and that one of the strikers once mooned him. (Pretino conceded that he did moon some drivers but denies that he ever walked on the picket line in such a way as to prevent ingress or egress to the plant.)

III. ANALYSIS

A union obviously will be held liable for the actions of persons who clearly are its agents such as its officers, organizers, and business agents. Also, a union normally will be held liable for the actions of appointed shop stewards and picket captains if the specific actions alleged fall within the scope of the normal functions for which they have been delegated responsibility. *Teamsters Local 860 (Delta Lines)*, 229 NLRB 993 (1977); *Food & Commercial Workers Local 248 (Milwaukee Independent)*, 222 NLRB 1023, 1024 (1976).

The more difficult question is to what extent is a union liable for the actions of striking employees who are not agents of the union.

In *Teamsters Local 860 (Delta Lines)*, supra at 994 the Board stated:

In determining whether a union is responsible for the misconduct of persons engaged in picketing, the Board applies the "ordinary law of agency." The Board will . . . impute the conduct of the union's pickets to the union only where it is shown that the union, either actually or impliedly, authorized the picket's conduct beforehand or ratified the conduct after it occurred. For example, where an authorized union representative such as a union official or picket captain participates in picketing misconduct or is present at the time the misconduct occurs, the Board will not hesitate to find that the union is responsible. Similarly, where the union has knowledge of its pickets' misconduct, but fails to take

steps “reasonably calculated” to control that misconduct, the Board readily imputes responsibility for the misconduct to the union. Where, however, pickets engage in misconduct which has been specifically forbidden by the union, and this misconduct is not brought to the union’s attention, or is of an isolated or non-recurring nature (so that the union has no opportunity to prevent it from recurring), the union will not be held responsible for that misconduct.

As to the actions of persons at a picket line, the Board will ordinarily hold a union liable for the actions of its pickets where there are repeated outbreaks even if such actions are taken outside the presence of persons who are union agents. In *Teamsters Local 784 (Coca-Cola Bottling)*, 160 NLRB 1776, 1779 (1966), the administrative law judge stated that where a picket line is a scene of repeated outbreaks “the union which is in charge of the picketing and which maintains some supervision over it, is responsible for such repeated misconduct even though it did not direct the wrongful action and even if its responsible leaders did not participate in the action or even themselves observed it.” See also *Avis Rent-A-Car System*, 280 NLRB 580 fn. 3 (1986); *Teamsters Local 695 (Yellow Cab)*, 221 NLRB 647, 653 (1975); *Teamsters Local 860 (Delta Lines)*, supra.

A union may also be found to be liable for the actions of nonagent persons who engage in acts away from a picket line if the conduct is related to the union’s authorized strike activity. For example, if a union assigns persons to follow company trucks and if those persons engage in misconduct, along the way, that misconduct would be related to the authorized union activity. In a sense, such activity could be considered as ancillary to a roving picket line and therefore be governed by the same rules as picket line activity. Thus, in *Teamsters Local 784 (Coca-Cola)*, supra, the administrative law judge also stated:

When a union dispatches pickets to follow trucks and the pickets repeatedly engage in violence, the union is legally responsible for the repeated outbreaks if it takes no effective action to curb the perpetrators and continues to dispatch the same individuals on similar picket duty with similar consequences.

See also *Teamsters Local 695 (Yellow Cab)*, supra.

On the other hand, actions by nonagents away from a picket line which occur in circumstances not related to authorized union activity will not be the basis of finding union responsibility. *Dover Corp.*, 211 NLRB 955, 956 (1974).

A union may even be liable for the actions of unidentified persons if the circumstantial evidence persuasively shows that the actions were taken in conjunction with the union’s picket line activity. In *Avis Rent-A-Car System*, supra, which involved an employer’s objections to an election, the Board, with Member Babson dissenting, stated:

We disagree with the hearing officer’s conclusions that the Petitioner was not responsible for the misconduct of the unidentified picket for the damage done to the cars of two employees . . . and for scattering of roofing nails on several days during the strike. When a union authorizes a picket line, “it is required to retain control over the picketing.” If a union is unwilling or unable

to take the necessary steps to control its pickets, it must bear the responsibility for the misconduct. . . . The hearing officer erred in finding that the Petitioner was not responsible for the misconduct of the unidentified picket because the Employer failed to identify the picket or show that he acted as the Petitioner’s agent or with the Petitioner’s approval. A union is responsible for the acts of its authorized pickets even if not specifically authorized or indeed specifically forbidden. Nor is it necessary to establish the identity of the pickets engaging in the misconduct. . . . We find the Union had an affirmative obligation to control the actions of the unidentified picket, and cannot escape responsibility by simply contending that neither Business Agent . . . nor picket captain . . . were present when the misconduct occurred.

Viewing the facts of this case in relation to Board law, I make the following additional conclusions:

1. As described above, it is recommended that those allegations of the complaint which were supported solely by the prior court testimony or affidavits of Steven Costanza be dismissed. These would be the allegations contained in paragraphs 8(n), (o), (p), (r), and (s) of the complaint.

2. The General Counsel withdrew the allegation contained in paragraph 8(q) of the complaint.

3. I credit the testimony of those witnesses who testified that on various occasions in August 1989 and thereafter they saw spikes in and around Electra Lane, the road which leads to the plant. These spikes, consisting of two nails welded together in such a manner as to ensure that a point will meet a tire, do not, as far as I am aware have any useful function other than to do damage. As these spikes were found at the picket line during the course of the strike, I conclude that the Union violated Section 8(b)(1)(A) in having its people place these spikes on the road. This conclusion is buttressed by the decision of Judge Morris (cited above) wherein he found that this same union contemporaneously engaged in the same type of conduct at another company.

4. The credited evidence establishes to my satisfaction that on October 17, 1989, persons engaged in picketing, in the presence of union agents, assaulted and threatened the driver of one of the Company’s trucks as he was leaving the facility. It therefore is concluded that the Union, in this respect, violated Section 8(b)(1)(A) of the Act.

5. I credit the testimony of those witnesses who stated that in August 1989 they were followed by strikers who drove their vehicles so as to impede the Company’s trucks. Moreover, I conclude that they did so in a reckless and dangerous manner. As the evidence shows that the Union dispatched strikers to follow the Company’s trucks, it is my opinion that the Union is liable for their actions engaged in away from the picket line. Accordingly, in this respect, I conclude that the Union violated Section 8(b)(1)(A) of the Act.

6. Having credited John Kuehn in relation to the allegations described above in paragraph 5, I shall also credit his testimony that at the picket line on August 11, 1989, as he was leaving the plant on a delivery truck, strikers Tim Mahon and Jose Coste, along with picket captain Ralph Cotto, blocked the road with their vehicles, banged on the truck’s windows, and knocked beer barrels off the truck. I further find that striker Jose Coste, on that occasion, threat-

ened to assault the truck's passengers. In these respects I conclude that the Union violated Section 8(b)(1)(A) of the Act.

7. I shall also credit the testimony of Rosando Perez to the effect that on August 11, 1989, he and the two other Sound employees were threatened with unspecified reprisals when they were told, in effect, by three strikers who followed them on the route that they were going "to get" the replacement workers.

8. The testimony of Edward Vogel regarding the bb shot was not sufficient in my opinion to establish that such a shot was fired against his window. Although I credit him, the event according to Vogel's testimony, took place at about 3 a.m. he did not see what happened, and the police officers who were at the picket line neither saw the incident nor could find any weapon. While I do not discount the possibility that some type of object was fired at or thrown against Vogel's windshield, I do not think that there is enough evidence to warrant the conclusion that such an action was carried out by the Union or its agents.

9. I do not think that the Union should be held liable for the events that took place at the delicatessen on 241st Street on the morning of September 22, 1989. George Muniz testified to a confrontation that was provoked by a person (apparently named Alex), who was with some of the strikers. According to Muniz, this person slapped him across the face and this led to a more general confrontation between the employees that he was with and some of the strikers. Although there was some testimony that a knife was brandished by strikers Wilfredo Lugo and Larry Williams, Muniz in his pretrial statement indicated that replacement Carlos Rodriguez was the first person to pull out a weapon at the scene. Muniz further testified that Lugo slashed a tire and that Alex kicked employee Jose Rodriguez twice before the nonstrikers returned to the plant.

The events described above took place away from the picket line and did not occur as part of any union activity. In essence, what took place was a confrontation of strikers and nonstrikers at a location where each went to get coffee. None of the strikers were anything more than ordinary pickets and the person who engaged in the alleged assaults was never identified as a union agent, a striking employee, or even as a former employee of the Company. Moreover, the testimony of the General Counsel's witnesses was that this person disappeared from the picket line for the next several months, thereby indicating that the Union did not condone or approve of his actions.

10. On September 22, when the replacements left the delicatessen, they drove back to the plant. On their way through Electra Lane, they splashed the pickets by driving fast through the large puddle that tends to accumulate there. (This was the unfair labor practice allegation against the Company which was settled.) The splash generated a degree of excitement at the picket line and the strikers loudly approached the car after it was parked. It seems that one of the occupants of the car got out brandishing a tire iron whereas the pickets picked up some clubs of their own. A brief and nonviolent standoff ensued and the nonstriking employees ran into the plant. While affording a brief moment of drama, I do not think that the incident amounts to a violation of Section 8(b)(1)(A) and I shall recommend dismissal of this allegation.

In addition to the above, there was testimony of various people that the pickets cursed at the replacement workers and on one occasion, "mooned" them. The use of obscene words or gestures does not, however, rise to the level of restraint or coercion as defined in Section 8(b)(1)(A) of the Act.

There also was other testimony of alleged actions by pickets that was more vague than what was described above. For example, William Davis testified that on unspecified occasions, unidentified strikers threw "things" or banged on his truck as he passed through Electra Lane. He also testified that on unspecified dates he was told by unidentified strikers that, "We'll get you, you took our jobs." Vogel also testified in vague fashion to an alleged incident when a bottle was thrown against the side of his truck and to similar threats as alleged by Davis.

In my opinion I do not need to determine whether the incidents described above by Davis and Vogel constituted violations of the Act. Assuming that they were, they would add nothing to this case and would not in any manner alter the remedy that will be recommended. By the same token, the overall outcome of this case will in no way be affected by a dismissal of these particular allegations.

CONCLUSIONS OF LAW

1. By placing spikes on the road outside the premises of Sound Distributing Corp., the Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

2. By assaulting, by threatening to assault, and by threatening employees with other reprisals, the Union has violated Section 8(b)(1)(A) of the Act.

3. By following trucks driven by the Company's employees and by driving vehicles in a reckless and dangerous manner, the Union has violated Section 8(b)(1)(A) of the Act.

4. By blocking ingress or egress to the Company's premises, and by blocking the Company's trucks as they attempted to make deliveries, the Union has violated Section 8(b)(1)(A) of the Act.

5. By banging on and throwing merchandise off the Company's trucks, the Union has violated Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, AFL-CIO, Scars-

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

dale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Placing spikes or other similar objects on the road outside the premises of Sound Distributing Corp.

(b) Assaulting, threatening to assault, or threatening employees with other reprisals.

(c) Following trucks driven by the Company's employees and driving vehicles in a reckless and dangerous manner so as to endanger the Company's employees.

(d) Blocking ingress or egress to the Company's premises, and blocking the Company's trucks as they attempt to make deliveries.

(e) Banging on and throwing merchandise off the Company's trucks.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its union office in New York, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Sound Distributing Corp., if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT place spikes or other similar objects on the road outside the premises of Sound Distributing Corp.

WE WILL NOT assault, threaten to assault, or threaten employees with other reprisals.

WE WILL NOT follow trucks driven by the Company's employees and drive vehicles in a reckless and dangerous manner so as to endanger the Company's employees.

WE WILL NOT block ingress or egress to the Company's premises, or block the Company's trucks as they attempt to make deliveries.

WE WILL NOT bang on or throw merchandise off the Company's trucks.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SOFT DRINK WORKERS UNION LOCAL 812,
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, AFL-CIO